IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No.856 of 2004

Vatsalabai Shankar Divate ..Petitioners

vs.

Tamma Ramchandra Divate ..Respondents

Shri S.S.Patwardhan for petitioners
Shri Machhindra A.patil for respondents.

CORAM: S.B.MHASE J.
17th March, 2006

P.C.

. Rule. Returnable forthwith.

2. This writ petition is directed against the judgment and order dated 29th August, 2002 passed by the IVth Additional District Judge, Pandharpur in Misc.Civil Appeal No.177 of 2001. The said application was filed to condone the delay in filing the first appeal against the judgment and order passed in Reg.Civil Suit No.185 of 1996 by the Civil Judge, Jr.Dn., Sangola in 21st October, 1999 and the appeal is filed on 6th September, 2000. There was delay in filing the appeal. The petitioner requested to condone the delay on two grounds i.e. (i) ground of illness and (ii) that the summons of Reg.Civil Suit No.185 of 1996 was not served on the petitioner who was defendant in the suit. The learned Judge

rejected the said application for condonation of delay after hearing the parties.

3. I have heard the learned Counsel appearing for the parties. Learned Counsel for the petitioner very fairly submitted that the ground of his illness is misconceived, however, he pointed out that there was no service of summons in Reg.Civil Suit No.185 of 1996 and therefore, the exparte decree is a bad decree. Since the decree was passed behind his back and without the knowledge of the petitioner, the petitioner is entitled for condonation of delay. Learned Counsel for the respondent very vehemently argued that the summons was served and the Civil Judge,Jr.Dn., Sangola has rightly passed the exparte decree.

4. It is pertinent to note that the record of the proceedings was called by this Court. The learned Additional District Judge has observed in para 7 of the impugned judgment that nothing has been brought to the notice of the Court to arrive at any conclusion that the summons was not served and/or there was no proper service. However, it appears that the IVth Additional District Judge has not bothered to go through the original record of

Reg.Civil Suit No.185 of 1996. With the help of both the learned Counsel I have gone through the original record and proceedings of the Trial Court. It is to be noted that even though in the roznama it is stated that the summons has been issued and surprisingly in A, B, C and D files which were tendered before this Court there is no summons, O/C of the summons and bailiff's report in respect of the service of the summons. Thus, the original record shows that actually the summons was not issued and served on the defendant/petitioner and the decree was passed by the Trial Court on the wrong assumption that the summons was duly served. It appears that both the Courts were negligent in scrutinizing the record before passing the order. It ultimately revealed that the decree was passed without the summons being issued and record is created to that effect. Therefore, this is a fit case for condonation of delay. The order dated 29th August, 2002 is, therefore, quashed and set aside. The delay in filing the appeal is condoned. The writ petition is allowed. It is hereby directed that the appeal be numbered as a regular appeal and proceed in accordance with law.

(S.B.MHASE J.)